Tajalle v. City of Seattle et al Doc. 18

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| JUAN TAJALLE, Plaintiff, vs. CITY OF SEATTLE, SEATTLE PUBLIC LIBRARY, OFFICER SAM 8, a.k.a. JOHN DOE #1, and JOHN DOE #2, Defendants. | No. C07 1509TSZ<br>DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS<br>NOTED ON MOTION CALENDAR 2/8/08 |

Defendants reply to plaintiff's response to their motion to dismiss. As shown below, plaintiff fails to articulate grounds for denying the motion. Accordingly, defendants renew their request that the motion be granted.

**1. Plaintiff fails to demonstrate defendants' intent to deter or chill his right of free speech.**

Defendants' motion for summary judgment on plaintiff's First Cause of Action is based on the absence of facts showing that the Library's security officers intended to violate Tajalle's First Amendment right of free speech. The element of intent is essential to a free speech claim. *Mendocino Environmental Center v. County of Mendocino*, 192 F.3d 1283, 1300 (9th Cir. 1999).

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

Dockets.Justia.com

Where an essential element of a claim is missing from the complaint, summary judgment is appropriate because all other facts become immaterial, and it is thus impossible for the plaintiff to demonstrate genuine issues of *material* fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Plaintiff's effort to defeat the motion with a different version of the facts is unavailing because, despite those differences, he still fails to show the officers' *intent* to deprive him of his First Amendment rights.

Tajalle's description of the events of June 14, 2006 differs in numerous ways from that set forth in defendants' moving papers. But conspicuously absent are facts that show, or from which it can be reasonably inferred, that the officers ejected Tajalle *because* he exercised his right of free speech. According to Tajalle, the incident was precipitated when "[it]...became obvious that [the officers] were in the process of ejecting another patron who appeared to be homeless who was just sitting by one of the desks by the security guards and bothering no one." Response, 2:14-17. That the other patron was "bothering no one" is conclusory, and such conclusion is not evidence that the patron had not violated a Library regulation.[1] The officers' conduct is not described by Tajalle as belligerent or aggressive, and thus his contention that the officers acted "unprofessionally" is likewise conclusory. *Id.*, 2:18. Tajalle's assertion that "he had done absolutely nothing to warrant an ejection," *Id.*, 3:5-6, is argumentative, inasmuch as it assumes the validity of his prior conclusions.

Conclusory or speculative allegations are insufficient to raise genuine issues of fact. *King v. Idaho Funeral Serv. Ass'n.*, 862 F.2d 744, 746 (9th Cir. 1988). When such contentions are

[1] Library regulations forbid, among other things, "Failing to comply with a reasonable staff request;" "Being under the influence of alcohol/illegal drugs...;" and "Entering the Library barefoot, without a shirt, with offensive body odor or personal hygiene, or being otherwise attired as to be disruptive to the Library environment." See Declaration of Marilynne Gardner, Exhibit 4, "Rules of Conduct," pp. 1-2.

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

removed from Tajalle's version of the events, there remain no facts showing that the officers acted improperly with respect to the other patron, and hence no basis for Tajalle to legitimately protest their conduct. Tajalle thus fails to establish a nexus between his exclusion from the Library and the officers' intent to chill his First Amendment right of protest. This failure to establish an element of his First Cause of Action warrants summary judgment of dismissal under *Celotex*.

**2. Plaintiff fails to show that his Second, Third, and Fourth Causes of Action state claims upon which relief may be granted.**

Defendants' Fed.R.Civ.P.12(b)(6) motion is based on plaintiff's failure to state a claim as to violations of his rights under the Fourth and Fourteenth Amendments. As with any motion under this rule, defendants assumed as true all properly pled allegations of fact, that is, facts which are not argumentative, speculative, or conclusory. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (liberal construction of complaint does not include accepting argumentative conclusions as true facts on Rule 12(b)(6) motion). A list of properly pled facts, set forth at p. 9 of defendants' motion, includes the fact that Tajalle is disabled. In his response, Tajalle does provide greater detail regarding the nature of his disability. However, those details do not cure the defects of pleading on which this motion is based.

***Fourth Amendment claims***

Defendants' position is that the Second Cause of Action should be dismissed because Tajalle states no facts showing that he was seized within the meaning of the Fourth Amendment. There is no allegation that he was physically restrained, that the officers brandished weapons, or used threats to prevent him from leaving, or detained him in anticipation of arrest by the police by, for example, handcuffing him. The complaint fails to state facts meeting the test of a Fourth

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

Amendment seizure, which requires a reasonable person to believe that he was not free to leave. *See United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980).

In response, Tajalle argues that his disability meant that the only way he could have left the Library was by using the "handicapped entrance," and that by ordering him to use the revolving door, the officers restrained his movement "just as surely as if police officers had slapped on handcuffs." Response, 7:4-9. But he was told to use the door to get *out* of the Library, and handcuffing him would have *prevented* his departure. It is thus unclear how the use of the revolving door is the functional equivalent of handcuffs.

In any event, there is nothing about Tajalle's disability that would make revolving doors, for him, an instrument of confinement. In a decision of the Social Security Administration's Office of Hearings and Appeals, attached to the Declaration of Juan Tajalle, the Administrative Law Judge found, among other things:

> 2. The claimant's impairments which are considered "severe" under the Social Security Act are depression, recurrent severe headaches with accompanying visual disturbance, nausea, dizziness, and loss of judgment, degenerative joint disease of the right shoulder/adhesive capsulitis, degenerative joint disease of the lumbar spine, and alcohol dependence on remission.
>
> . . .
>
> 4. The claimant's impairments prevent him from lifting more than 20 pounds occasionally 10 pounds frequently or standing/walking more than six hours in an eight hour day. The claimant's depression prevents the claimant from responding appropriately to supervision, co-workers, and usual work situations. The claimant's memory and ability to concentrate are impaired and he has difficulty being around other people in stressful competitive situations…[2]

---

[2] As noted in defendants' opening brief, p. 14, fn. 4, on a motion under Rule 12(b)(6), a court may take judicial notice of matters of public record outside the pleadings without converting the motion into a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). This includes records and reports of administrative agencies. *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). The Decision of the Social Security Administration's Office of Hearings and Appeals, submitted by plaintiff, falls within this exception.

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

Although Tajalle suffers from depression, headaches, shoulder and back problems, and although his judgment and memory are impaired, he makes no allegation that he is physically or psychologically incapable of using a revolving door, or that the use of a revolving door would, because of his disability, confine or restrain him in some way. There is thus no factual basis for the contention that in using the revolving door at the Library, Tajalle was somehow justified in feeling that he was restrained. Indeed, it is difficult to understand how a person, instructed to exit the Library, could reasonably believe he was not free to leave. Even with the additional details of his disability, Tajalle still fails to allege facts showing that the officers seized him in violation of the Fourth Amendment. Accordingly, the Second Cause of Action should be dismissed. The Third Cause of Action, alleging unreasonable force during a seizure, should be dismissed *a fortiori*.

***Fourteenth Amendment Claims***

Defendants' position is that the Fourth Cause of Action fails to state a claim of either substantive or procedural due process violations under the Fourteenth Amendment. Defendants first note that the complaint fails to allege facts showing that Tajalle was deprived of a liberty or property interest in a manner that shocks the conscience as a matter of law, which is the predicate of a substantive due process claim. *See County of Sacramento v. Lewis*, 523 U.S. 833, 847, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998). Plaintiff ignores this rule, citing *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989). Response, 7:9-25. *Graham*, however, addressed excessive force claims in the context of Fourth Amendment protections, holding that a "'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 395, 109 S. Ct. at 1871. Since plaintiff has failed to allege facts showing that he was seized within the

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

meaning of the Fourth Amendment, the objective standard applicable to such cases is inappropriate in Fourteenth Amendment analysis. For this reason, plaintiff's discussion of the *Graham* factors, Response, 7:9-26, is irrelevant to the substantive due process issue raised on this motion. Simply put, plaintiff makes no meaningful response to defendants' contention that his complaint fails to state facts showing he was deprived of substantive due process in a manner that shocks the conscience as a matter of law.

With regard to the Fourteenth Amendment's guarantee of procedural due process, defendants argue that the availability of administrative review of exclusion orders satisfies constitutional requirements. Motion, 13:4-14:12. Plaintiff disputes this, and, citing *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985), argues that the Library's failure to conduct a pre-deprivation hearing denied him due process. Response, 8:13-24. In *Crozier*, the Ninth Circuit held that the forfeiture provisions of the Crime Control Act did not comply with the due process requirements of the Fifth Amendment because the Act did not allow challenges to restraining orders on a criminal defendant's property unless and until the defendant was convicted. *Id.* at 1384. Thus, in the event the defendant was acquitted, interested parties would have no remedy for a lengthy and wrongful deprivation of their property. *Id.* There are scant analogs between *Crozier* and this case.

For one thing, an administrative review was available to Tajalle within 14 days of the initial exclusion order. Adams Declaration, Exhibit 2. Compared to delays of "months to years" contemplated in *Crozier*, *Id.* at 1383, this does not constitute a serious deprivation of a constitutionally protected interest. Moreover, as the *Crozier* court pointed out, if the defendant in a forfeiture case is acquitted, parties with an interest in the seized property were entitled to no hearing at all. *Id.* at 1384. Here, the Library affords a prompt two-level administrative review of

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

all exclusion orders, if requested. Gardner Declaration, Exhibit 5, pp. 1-2. However, while distinguishable on the facts, *Crozier* does restate the principle that to determine what process is due, it is necessary to balance the risk of an erroneous deprivation, the state's interest in providing specific procedures, and the strength of the individual's interest. *Id.* at 1383.

Plaintiff does not perform this three-way balance of interests, but concludes nonetheless that due process requires the Library to convene a full-blown evidentiary hearing the moment a security officer issues an exclusion order. Response, 8:20-22. He makes no mention of the Library's need to act quickly to protect the rights and safety of patrons and staff against disruptions and disturbances of the kind described in the Library's Rules of Conduct. Gardner Declaration, ¶ 6. He also fails to show that his loss of access to the Library represents so substantial a deprivation, that a post-exclusion administrative review imposes an unacceptable hardship. Rather, he says merely that "...the loss of use of the library has circumvented [*sic*] my efforts in pursuit of information on my parents and other productive projects that I initiated in the old library." Tajalle Declaration, 4:10-11. Tajalle's inability to pursue information about his parents and other, unspecified interests is hardly more compelling than the loss of a driver's license, or a student's suspension from school, instances where a post-deprivation hearing has been held to satisfy due process requirements. *See Cassim v. Bowen*, 824 F.2d 791, 797, fn.2 (9th Cir. 1987), and cases cited. The assertion that plaintiff's interests in using the Library were "extremely high" and that "he was denied the right to educate himself" are unsupported by his declaration.[3]

[3] Plaintiff also argues that he was denied due process when he was ordered through the revolving door instead of the "regular door." Response, 8:26-27. However, he cites no authority supporting the premise that he has a liberty or property interest in using the "regular door," such that an order to use the revolving door implicates his rights under the Fourteenth Amendment. Accordingly, this argument should be disregarded.

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

In short, plaintiff makes no meaningful response to defendants' argument that the Library's administrative review of exclusion orders satisfies the procedural due process requirements of the Fourteenth Amendment. The Fourth Cause of Action fails to state a claim of denial of procedural due process, and should be dismissed accordingly.

**3. Plaintiff offers no argument against dismissal of his Fifth, Sixth, and Seventh Causes of Action.**

Defendants argue that the absence of constitutional violations makes it impossible for plaintiff to demonstrate municipal liability under ¶ 1983, and, at the same time, such absence confers the statute's qualified immunity on the security officers. Defendants rely on *Jackson v. Gates*, 975 F.2d 648, 654 (9th Cir. 1992) and *Kennedy v. City of Ridgefield*, 411 F.3d 1134, 1141 (9th Cir. 2005), among other cases. Motion, 14-15. Plaintiff's response misconstrues this argument: "As for municipal liability, the defendants only assert that there are [*sic*] no municipal liability because there is no 1983 liability to the individual defendants." Response, 9:8-11. Because plaintiff fails to demonstrate the existence of constitutional violations, defendants renew their request for dismissal of the Fifth Cause of Action, along with all claims against the individual officers.

Plaintiff makes no response of any kind to defendants' argument that the Court should exercise its discretion under 28 U.S.C. § 1367(c) to dismiss the Sixth and Seventh Causes of Action. Defendants likewise renew their request that these claims be dismissed as outside the Court's supplemental jurisdiction.

**4. Plaintiff's request to continue this motion to conduct discovery should be denied.**

Plaintiff has requested that this motion be continued under Fed.R.Civ.P 56(f), in order to allow him to conduct further discovery. His intent is "to depose doctors to prove his disability, or

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

depose the Fireman in order to establish what they did at the time of the incident." He should also be allowed to conduct discovery to determine the identity of other staff who may have witnessed the event." Response, 9:4-18

The Court has discretion to grant a request for discovery by a party opposing a motion for summary judgment. *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir.1995). However, plaintiff's request should be denied for several reasons. First, the issues on which he seeks discovery are not in dispute. Defendants accept as true, for the purposes of this motion, that Tajalle suffers from the conditions described in the administrative order he has attached to his declaration. For this reason, there is no need to "depose doctors" to prove that disability. Likewise, defendants do not dispute that a Fire Department aid unit arrived at the scene and rendered treatment to Tajalle. But since Tajalle's injuries, if any, are not at issue in this proceeding, deposing "the Fireman" will add nothing to the Court's ability to decide the motion. Indeed, since the facts as Tajalle describes them– minus argument and speculation– are accepted as true on this motion, there is no need to "discover the identity" of other staff who may have witnessed the event.

Moreover, an extension under Rule 56(f) would apply only to that part of defendants' motion brought under Rule 56(c), that is, the part of the motion seeking summary judgment on plaintiff's First Cause of Action, claiming violation of his First Amendment rights. The other rule on which this motion is based, Fed.R.Civ.P. 12, does not provide continuances for discovery. Thus, a continuance would only be available with respect to defendants' position that the complaint fails to state facts showing the element of intent to deprive plaintiff of First Amendment rights. However, plaintiff fails to show that such discovery would actually produce material evidence.

**Thomas A. Carr**
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

On a request for a continuance under Rule 56(f), the burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment. *Nidds v. Schindler Elevator Corp.*,113 F.3d 912, 921 (9th Cir. 1996). But plaintiff does not even claim that he needs to conduct discovery on the issue of the officers' intent. The officers have stated in their declarations that they did not intend to deprive Tajalle of First Amendment rights when they told him to leave the Library. Rambayon Declaration, ¶5; Adams Declaration, ¶2. Plaintiff proffers no facts to show that there exists any other evidence going to the officers' states of mind. Denial of plaintiff's request for a continuance is comfortably within the Court's discretion.

Respectfully submitted this ___8th__ day of February, 2008.

THOMAS A. CARR
Seattle City Attorney

By: ____________________________

JEFFREY COWAN, WSBA #19205
Assistant City Attorney
Seattle City Attorney's Office
PO Box 94769
Seattle, WA 98124-4769
Ph: (206) 684-8226 Fax: (206) 684-8284
E-mail: Jeffrey.cowan@seattle.gov
Attorneys for Defendants